

**Office of Chief Counsel  
Internal Revenue Service  
memorandum**

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CC:PA:APJP:B02:JABremer

date: May 10, 2006

to: Kelli D. Winegardner  
Supervisory Internal Revenue Agent

from: Ashton P. Trice  
Chief, Branch 2 (Administrative Provisions & Judicial Practice)  
CC:PA:APJP:B02

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In a Final Audit Report dated March 14, 2006, entitled, "Actions Are Planned to Extend the Grace Period before Assessing the Failure to Pay Tax Penalty; However, Computer Programming Needs to Be Corrected," the Treasury Inspector General for Tax Administration recommended that the Commissioner, Small Business/Self-Employed Division, request an opinion from the Office of Chief Counsel what amounts the Service should consider to determine the length of the grace period a taxpayer has after notice and demand to pay tax not shown on a return without incurring a failure to pay penalty under section 6651(a)(3). This memorandum responds to that request.

Section 6651(a)(3) provides as follows:

In case of failure to pay any amount in respect of any tax required to be shown on a return specified in paragraph (1) which is not so shown (including an assessment made pursuant to section 6213(b)) within 21 calendar days from the date of notice and demand therefor (10 business days if the amount for which such notice and demand is made equals or exceeds \$100,000), unless it is shown that such failure is due to reasonable cause and not due to willful neglect, there shall be added to the amount of tax stated in such notice and demand 0.5 percent for each additional month or fraction thereof during which such failure continues, not exceeding 25 percent in the aggregate.

The critical inquiry is whether the amount of tax improperly omitted from the return is considered alone, or whether the total amount referenced in the notice and demand is considered for purposes of the \$100,000 threshold used to determine whether the applicable grace period is 21 calendar days or 10 business days.

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We believe that the language of section 6651(a)(3) is ambiguous. It is not clear from the language whether the \$100,000 refers to only the amount of tax omitted from the return or to the total amount referenced in the notice and demand. We believe that the better interpretation is that the \$100,000 threshold is based on the total amount referenced in the notice and demand.

This interpretation is consistent with section 6601(e), which requires consideration of the entire amount reflected on a notice and demand for purposes of determining the \$100,000 threshold with regard to the grace period on the imposition of interest. If section 6651(a)(3) is interpreted to consider only the amount of tax for purposes of the \$100,000 threshold, the late penalty-free period under section 6651(a)(3) could differ from the interest-free period under section 6601(e). Because Congress amended these grace period language in these two statutes at the same time, we believe Congress intended section 6651(a)(3) and section 6601(e) to work together in the same manner.

Additionally, a shorter grace period for taxpayers owing \$100,000 or more appears to be based on a congressional desire not to be as tolerant of taxpayers who have amassed large tax debts. We see no reason why taxpayers who have amassed a \$100,000 debt in a variety of ways should be treated any more favorably than taxpayers who owe a \$100,000 or more as a result of failing to show the correct tax on a single tax return. Accordingly, we believe that the \$100,000 threshold should be based on the total amount referenced in the notice and demand.

If you have any questions, please call Jason Bremer at 202-622-7951.